Supreme Court, U.S.
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No. 04-802

IN THE

Supreme Court of the United States

AMANA COMPANY d/b/a AMANA APPLIANCES, INC.,

Petitioner,

v.

EDEN ELECTRICAL, LTD.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether this Court should grant certiorari to review the Eighth Circuit's factbound determination of an appropriate punitive award against Amana Company for its fraud, which resulted in a 4.8 to 1 ratio between punitive and compensatory damages and which is otherwise entirely consistent with this Court's precedents, including its recent decision in *State Farm Mutual Automobile Insurance Company v. Campbell*, 538 U.S. 408 (2003).

RULE 29.6 STATEMENT

The parent corporation of Respondent Eden Electrical, Ltd. is Eden Electrical Appliances. There is no publicly held company that owns ten percent or more of the stock of Eden Electrical, Ltd.

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CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

The Supremacy Clause provides that the Constitution "and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land. . . ." U.S. Const., Art. VI, cl. 2.

STATEMENT OF THE CASE

This case involves conduct so extreme as to lead the trial judge to conclude that he could hardly imagine a more egregious business fraud. Pet. App. 34. The jury determined that Eden Electrical was entitled to compensatory damages of $2.1 million and that Amana Company's fraud warranted punitive damages of $17.875 million. The trial judge reduced the punitive award significantly, from $17.875 million to $10 million. The United States Court of Appeals for the Eighth Circuit unanimously affirmed, in a factbound application of this Court's precedents. The Eighth Circuit denied Amana Company's request for rehearing en banc.

1. Amana's fraudulent scheme.

As the Eighth Circuit and the trial court both determined, Amana Company ("Amana") engaged in an elaborate scheme to defraud Eden Electrical.[1] Pet. App. 8 (determining that

1. There is simply no merit to Amana's argument (Pet. i, 15) that its fraud liability is premised entirely on one oral representation.

Amana engaged in an "extraordinarily reprehensible scheme to defraud"); Pet. App. 15-24, 34 (discussing Amana's fraudulent scheme).

During the 1990s, Leon Adam was the distributor for Amana in Israel. Adam began to accumulate substantial debt for inventory purchased from Amana. That inventory, which was stored in a New Jersey warehouse, was outdated and referred to as "junk" by Amana employees. In the late 1990s, Amana's Vice President of International Sales (Richard Montross) felt tremendous pressure to collect Adam's debt. Amana was particularly concerned because Adam's debt exceeded the credit limit established by Amana's insurer of foreign accounts. When Amana was sold by its corporate parent, its need to recover Adam's debt increased even more. Amana eventually stopped shipping product to Adam because of his high debt, putting itself out of business in Israel. By early 1998, Adam's debt had reached $2.4 million, the largest international debt in Amana's history. An Israeli court-appointed receiver then took over Adam's company and put it into bankruptcy. As a result, Adam had no way to repay his debt to Amana.

Because of Amana's desperate need to collect the $2.4 million debt and Adam's inability to pay, Amana Vice President Montross and Leon Adam devised a fraudulent scheme. Montross instructed Adam to find a "sucker" who would pay $2.4 million for the "junk" New Jersey inventory in exchange for appointment as Amana's exclusive Israeli distributor. After the "sucker" paid the $2.4 million, Amana would fabricate a dispute and terminate the distributorship.

Pursuant to Montross' instructions, Leon Adam set out to find an Israeli company that could pay $2.4 million.

He chose Eden Electrical ("Eden"), a prominent Israeli electronics business founded by Itzhak Eden. In early February 1998, Adam offered Eden what Adam described as the "number one opportunity of a lifetime." Eden was told that if it paid $2.4 million for some Amana inventory, it would be granted Amana's Israeli distributorship.

Itzhak Eden was quite flattered to be offered the Amana distributorship. However, he was willing to pay $2.4 million to become Amana's distributor only if certain conditions were met: (a) the distributorship had to be exclusive; (b) the distributorship had to be long-term; and (c) the relationship between Amana and Eden had to be direct. Acting on behalf of Amana, Leon Adam agreed to Eden's conditions.

On February 16, 1998, Eden representatives traveled to Amana, Iowa to meet with Amana officers and Leon Adam. The Amana officers confirmed in writing that Eden's distributorship would be exclusive and that the business relationship between the companies would be direct.[2] Eden paid the $2.4 million to Amana and signed the distributorship agreement.

Once Eden had signed the agreement, an Amana officer took it out of the room and made a handwritten change to the termination provision, reducing the notice period to thirty days. When the Amana officer brought the agreement back into the room, the Eden representatives noticed the handwritten change and demanded an explanation. The Amana officers lied, stating that the change was made

2. The letter promising a direct business relationship was drafted by Leon Adam and signed by Amana's International Credit Manager (Leonard Mason). According to the International Credit Manager, he "didn't intend anything" by signing the letter.

pursuant to a company-wide policy.[3] The Amana officers also promised Eden that its distributorship would be long-term and that Amana would act in "good faith."

The very same day that Amana executed its agreement with Eden, Amana's General Counsel (Matthew Clark) sent a letter to the Israeli court-appointed receiver regarding the status of the Israeli distributorship. The letter (drafted by Leon Adam) stated that Amana was "actively searching" for a new Israeli distributor.

The agreement signed by Amana and Eden on February 16, 1998, expressly provided that Eden's distributorship was exclusive. Unbeknownst to Eden, that same day, Amana signed an agreement with Leon Adam allowing him to sell "reworked" Amana refrigerators in Israel. Eden was also unaware that Amana had previously promised to sell 5,100 Amana-manufactured refrigerators to another Israeli business (Crystal Consumer Products) during Eden's "exclusive" term.

Oblivious that Amana had chosen his company to defraud, Itzhak Eden believed that the Amana distributorship would be the "crown jewel" of his business. Eden hired additional employees, established retail outlets for Amana products, and ordered thousands of red-white-and blue warranty certificates bearing Amana's name. Eden sent a letter to Amana explaining his business activities and requesting an invitation to Amana's factory. Amana did not

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3. As the trial court concluded, there was no company-wide policy requiring the handwritten change. Pet. App. 22 n.5. Significantly, the distributorship agreement signed by Eden's successor did not contain the 30-day notice provision added by Amana to Eden's agreement.

respond. Eden telephoned Amana and attempted to order additional inventory. Amana refused.

Amana then moved forward with its plan to fabricate a dispute with Eden. Itzhak Eden received two letters from Amana Vice President Montross stating that Eden was required to use another company (owned by Adam's business associate) as an exporter. In response, Eden sent a letter to Amana explaining that the requirement of an exporter seemed "very strange" in light of Amana's written promise of a direct relationship. Amana did not reply.

Meanwhile, Montross and Adam finalized the details for terminating Eden's distributorship, which Adam described as the "kill." In a letter to Montross, Adam outlined a "strategy" for termination and discussed Eden's legal remedies upon termination, including whether Eden could sue Amana in Israel. On May 4, 1998, Adam sent Montross a draft termination letter for Eden. Adam's handwritten note to Amana states: "Dear Friends: Let's f*** those bastards." Later that day, Montross sent Eden a two-sentence termination letter that was virtually identical to Adam's draft.

Eden had been Amana's distributor for only seventy-seven days when it received the termination letter. Eden had not even received the inventory that it had purchased from Amana for $2.4 million.

Eden contacted Amana and Amana's corporate parent on several occasions asking for a meeting and requesting the return of its $2.4 million payment. Eden was told that Amana had nothing to say.

The termination of Eden's distributorship took effect on June 3, 1998. Amana appointed Crystal Consumer Products as its Israeli distributor nine days later.

Eden's business collapsed because of the termination of its Amana distributorship.[4] Eden eventually took possession of the inventory purchased from Amana but not before incurring $200,000 in fines and demurrage.[5] Eden ultimately sold that inventory at a loss of $1.247 million.

2. **The trial.** Eden filed suit against Amana in the Northern District of Iowa. The Honorable G. Thomas Eisele, United States District Judge for the Eastern District of Arkansas, presided by designation at trial.

Amana could not and did not deny that Eden had been defrauded. In fact, Amana Vice President Montross *admitted* during trial that Eden was a victim of fraud. Instead, Amana argued that Eden had been defrauded by Leon Adam rather than by Amana. This defense conflicted with the plethora of evidence that Adam was Amana's agent, including Adam's testimony regarding the fraudulent scheme devised by Montross and himself, Adam's advice to Amana regarding Eden's termination, and Adam's drafting of letters signed by Amana officers. *See generally* Pet. App. 30.

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4. Contrary to Amana's assertion (Pet. 2 n.1), Eden is not currently in negotiations to sell its stores. Eden was forced to sell its stores years ago because of Amana's fraud.

5. Eden incurred the fines and demurrage because Amana refused to provide Eden with documentation that the inventory had been manufactured in the United States.

The trial court submitted fraudulent misrepresentation and fraudulent concealment claims to the jury. The fraudulent misrepresentation instruction required proof of a representation "that Amana was in good faith seeking Eden Electrical to become its exclusive distributor in Israel."[6] The twelve jurors unanimously determined that Amana had committed fraudulent misrepresentation. The fraudulent concealment instruction required proof that Amana owed a duty of disclosure to Eden and that Amana knew before appointing Eden that it would appoint Crystal Consumer Products as Eden's successor. Amana strongly contested both of those issues at trial. The jury found that Eden had not proven fraudulent concealment by clear and convincing evidence.

The trial court limited Eden's compensatory damages to two years' lost profits, despite the fact that Amana's two prior distributors had collectively served for two decades. The jury awarded $2.1 million in lost profits, $500,000 *less* than requested by Eden's counsel during closing argument.

The punitive damages instruction explained that the jury could award punitive damages only if Eden had proven by clear and convincing evidence that Amana's conduct was willful and wanton. The trial court instructed the jury, *without* objection by Amana, that it could consider Amana's financial condition when fixing the amount of punitive damages. Amana stipulated that its net worth was $325 million. The twelve jurors unanimously imposed punitive damages in the amount of $17.875 million.

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6. Contrary to Amana's argument, the oral promise of good faith by Amana's Territory Manager was not its only representation of good faith. Under Iowa law, representations are made through conduct as well as words, as the jury was instructed *without* objection by Amana. Amana represented good faith when it took Eden's $2.4 million and entered into a distributorship agreement with Eden.

3. **The trial court's reduction of the punitive award.** Amana filed a post-trial motion seeking reduction of the punitive award. According to the trial court, it was "evident" that the jury had not been inflamed or prejudiced. Pet. App. 37-38. The court determined, however, that the jury's punitive award was constitutionally excessive and should be reduced from $17.875 million to $10 million. Pet. App. 43.

The trial court's decision was based on a factbound application of this Court's punitive damages jurisprudence, including *State Farm v. Campbell*, 538 U.S. 408 (2003) and *BMW v. Gore*, 517 U.S. 559 (1996). Significantly, the trial judge of thirty-five years observed: "If one accepts the Plaintiff's evidence, one can hardly think of a more egregious intentional and malicious business fraud case." Pet. App. 34.

One of the many factors considered by the trial court was Amana's $325 million net worth. While Amana implies that the trial court's only authority for such consideration was Finnish law (Pet. 8-9), the trial court actually relied on this Court's decisions in *TXO v. Alliance*, 509 U.S. 443 (1993) and *Pacific Mutual v. Haslip*, 499 U.S. 1 (1991). Pet. App. 42-3.

4. **The Eighth Circuit's decision.** Amana appealed to the Eighth Circuit, alleging that the fraud and agency instructions were improper and that the reduced punitive award was excessive. Eden cross-appealed, asserting that the trial court had erred in reducing the jury's punitive award to $10 million. The Eighth Circuit affirmed on all grounds. Pet. App. 2.

The Eighth Circuit applied this Court's punitive damages jurisprudence, including *State Farm Mutual Automobile*

Insurance Company v. Campbell, 538 U.S. 408 (2003). Its decision sets forth all three *Gore* guideposts and contains a detailed discussion of the facts surrounding Amana's fraud. Noting that reprehensibility is the most important guidepost, the Eighth Circuit determined that Amana engaged in an "extraordinarily reprehensible scheme to defraud" (Pet. App. 8) and that Amana's conduct was "purposefully designed to maliciously victimize another company. . . ." (Pet. App. 7). The Eighth Circuit agreed with the trial court that a punitive award of $10 million against Amana meets the requirements of due process. Pet. App. 6.

Amana chooses to characterize the Eighth Circuit's award against it as the largest award that the court "has ever upheld to a single entity." Pet. 2. *Contra TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 453-4 (1993) (explaining that "meaningful comparisons" of punitive awards are "difficult to make"). Through its careful wording, Amana has avoided mentioning other multi-million dollar punitive awards imposed by the Eighth Circuit, including a $10 million punitive award in a case involving ten plaintiffs. *Latham Seed Co. v. Nickerson Am. Plant Breeders, Inc.*, 978 F.2d 1493, 1501 (8th Cir. 1992) (affirming ten $1 million punitive awards in fraud case involving ten plaintiffs). *See also Conseco Fin. Servicing Corp. v. North Am. Mortgage Co.*, 381 F.3d 811, 825 (8th Cir. 2004) (in unfair competition case that did not involve "extremely reprehensible conduct," reducing $18 million punitive award to $7 million); *Robertson Oil Co., Inc. v. Phillips Petroleum Co.*, 14 F.3d 373, 385 (8th Cir. 1993) (affirming $4 million punitive award for fraud and $4 million punitive award for tortious interference). Amana also ignores Eighth Circuit cases involving ratios significantly higher than the 4.8 to 1 ratio

imposed against it. *E.g.*, *Ross v. Kansas City Power & Light Co.*, 293 F.3d 1041, 1049 (8th Cir. 2002) (imposing 10:1 ratio in employment discrimination action); *Grabinski v. Blue Springs Ford Sales, Inc.*, 203 F.3d 1024, 1026 (8th Cir. 2000) (affirming 27:1 collective ratio in fraud action); *Kimbrough v. Loma Linda Dev., Inc.*, 183 F.3d 782, 785 (8th Cir. 1999) (affirming 10:1 ratio in sexual harassment action).

5. **The Eighth Circuit's denial of en banc review.** Amana requested en banc review of the punitive award against it. The Eighth Circuit denied Amana's request.

REASONS FOR DENYING THE PETITION

Amana's Petition sets forth three arguments, none of which articulate a basis for certiorari.

In its first argument, Amana asks this Court to adopt two bright-line rules for determining whether a punitive award complies with due process.[7] This Court has repeatedly refused to reduce due process to a "bright-line," including in its recent *State Farm* decision. *E.g. State Farm v. Campbell*, 538 U.S. 408 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996). Amana has offered no justification for abandoning this Court's precedents. Amana's accusation that

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7. Amana's first proposed rule would provide that when a punitive award is at least $100,000, the award would be deemed "presumptively unconstitutional" if the reviewing court did not make "specific findings regarding each of the *Gore / State Farm* guideposts (including the subparts of the reprehensibility guidepost)." Pet. 13-14. Amana's second proposed rule would provide that "the highest previous punitive damage award affirmed by the highest court of a state" would set "the presumptive ceiling for any federal award under that state's law." Pet. 14.

lower courts are awarding punitive damages based solely on "gut reactions" is completely unfounded, as Amana's own authority reveals. Furthermore, the rules proposed by Amana are themselves contrary to fundamental principles of this Court's jurisprudence. Under Amana's first proposed rule, the constitutionality of a punitive award would depend not on reprehensibility, ratios, and comparable penalties (as required by *State Farm*) but rather on whether the reviewing court made specific findings regarding all punitive damages factors, regardless of whether the factors have any possible relevance to the particular case. This Court has already rejected such a formalistic approach to due process review. *See TXO*, 509 U.S. at 464-5. In addition, Amana's first rule would arbitrarily apply only to punitive awards of at least $100,000. Under Amana's second proposed rule, a punitive award would not be based on the particular facts of the case, as this Court has consistently required. *See State Farm*, 538 U.S. at 425. Instead, under Amana's rule, the constitutionality of a punitive award would depend on the highest punitive award affirmed by a state court in some other case.

Amana's second argument is that the Eighth Circuit erred in its factbound application of this Court's punitive damages jurisprudence. The Eighth Circuit's decision is not erroneous. Even if it were, Amana's criticisms of the Eighth Circuit's decision would not justify the granting of certiorari. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law").

As its third argument, Amana labels circuit court decisions in terms of various "approaches" toward punitive

damages. Amana does not identify an intercircuit conflict or otherwise articulate a basis for certiorari. *See* Sup. Ct. R. 10. Moreover, Amana's labels mischaracterize the courts' decisions, which are based on this Court's punitive damages jurisprudence.

I. Certiorari should not be granted to adopt Amana's proposed rules that conflict with fundamental principles of this Court's jurisprudence.

A. Amana's proposed rules seek to reduce due process to a "bright-line," which this Court has repeatedly refused to do.

Amana asks this Court to grant certiorari to adopt two bright-line rules for determining whether a punitive award complies with due process. Under Amana's first rule, the constitutionality of a punitive award would depend on the number of punitive damages factors discussed in the reviewing court's decision. Pet. 13-14. Under Amana's second rule, the constitutionality of a punitive award would depend on the highest punitive award previously affirmed by a state court in some other case. Pet. 14.

A majority of this Court has held that the amount of a punitive award is subject to review under due process. *E.g.*, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003); *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 453-4 (1993). However, it recognizes that the determination of whether a punitive award satisfies due process is "inherently imprecise." *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 434 (2001). Accordingly, this Court has consistently refused to reduce

due process to a "bright-line." *E.g.*, *TXO*, 509 U.S. at 458 (1993) (affirming the rejection of a "mathematical bright line"); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991) ("We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case"). *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 583 (1996) ("It is appropriate, therefore, to reiterate our rejection of a categorical approach"). As recently as its 2003 *State Farm* decision, this Court "decline[d] again to impose a bright-line ratio which a punitive damages award cannot exceed." *State Farm*, 538 U.S. at 425.

This Court's refusal to adopt a "bright-line" due process test for punitive damages is entirely consistent with its constitutional jurisprudence. In the context of free speech,[8] right to counsel,[9] takings,[10] and unreasonable searches and seizures,[11]

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8. *Buckley v. American Constitutional Law Found., Inc.*, 525 U.S. 182, 192 (1999) ("We have several times said 'no litmus-paper test' will separate valid ballot-access provisions from invalid interactive speech restrictions; we have come upon no substitute for the hard judgments that must be made") (citations omitted).

9. *Iowa v. Tovar*, 541 U.S. 77, 124 S. Ct. 1379, 1388 (2004) (explaining that compliance with the Sixth Amendment cannot be resolved by a "formula or script" but rather "will depend on a range of case-specific factors").

10. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 326 (2002) ("Indeed, we still resist the temptation to adopt *per se* rules in our cases involving partial regulatory takings, preferring to examine a number of factors rather than a simple mathematically precise formula").

11. *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) ("[T]he touchstone of the Fourth Amendment is reasonableness," which requires a "fact-specific" inquiry rather than "bright-line rules").

this Court has determined that constitutional doctrines cannot be reduced to a "neat set of legal rules." *Illinois v. Wardlow*, 528 U.S. 119, 126-7 (2000) (Stevens, J., concurring in part and dissenting in part) (explaining that the concept of reasonable suspicion under the Fourth Amendment cannot be "reduced to a neat set of legal rules" but rather "must be determined by looking to the totality of the circumstances — the whole picture") (citations omitted).

Adopting Amana's proposed bright-line rules would require nothing less than an abandonment of this Court's punitive damages jurisprudence, including its 2003 *State Farm* decision. Such action would be warranted only for "special justification," which is wholly absent here. *See Harris v. United States*, 536 U.S. 545, 557 (2002) ("Even in constitutional cases, in which *stare decisis* concerns are less pronounced, we will not overrule a precedent absent a special justification") (citations omitted). Amana contends that its bright-line rules are necessary because judges are "ignoring" due process jurisprudence and awarding punitive damages based "simply on [their] gut reactions to the defendants' conduct." Pet. 12. By making this bold accusation, Amana asks this Court to reject the precept that "there is *always* a reason to believe" that judges "know the law" and "apply it in making their decisions." *Lambrix v. Singletary*, 520 U.S. 518, 532 n.4 (1997). *See Aetna Life Ins. Co. v. LaVoie*, 475 U.S. 813, 820 (1986) ("As [B]lackstone put it, the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea") (citation omitted). Furthermore, Amana offers no authority demonstrating the hypothesized "gut reaction" decisions regarding punitive damages. The *Exxon Valdez* decision cited by Amana sets

forth a detailed factual analysis, a discussion of the history of punitive damages jurisprudence, and an exhaustive application of the three *Gore* guideposts. *In re the Exxon Valdez*, 296 F. Supp. 2d 1071, 1076-8, 1085-1109 (D. Alaska 2004). The *Southern Union* decision cited by Amana is also based on an application of the three *Gore* guideposts. *Southern Union Co. v. Southwest Gas Corp.*, 281 F. Supp. 2d 1090 (D. Ariz. 2003).[12] Similarly, there is no reason to suspect that the Eighth Circuit's award of punitive damages against Amana was a lawless "gut reaction," as Amana suggests. The Eighth Circuit's decision articulates the three *Gore* guideposts, analyzes the specific facts surrounding Amana's fraud, and reaches a decision entirely consistent with this Court's precedents, as discussed further below. Pet. App. 1-9.

B. Amana's first proposed rule would improperly shift the focus of due process review away from factually-specific issues such as reprehensibility to the formalistic issue of whether a reviewing court made express findings regarding all punitive damages factors.

Under Amana's first proposed rule, when a punitive award is "six figures or above," the award would be deemed "presumptively unconstitutional" if the reviewing court did not make "specific findings regarding each of the *Gore / State Farm* guideposts (including the subparts of the reprehensibility guidepost)." Pet. 13-14.

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12. The fact that *Southern Union* imposed a ratio of 153 to 1 does not mean that it was ignoring the law, as Amana suggests. Rather, the court determined that under *State Farm*, *Gore*, and *TXO*, it should consider not only the plaintiff's compensatory damages but also "potential" damages when evaluating the ratio. *Id.* at 1104-5.

In its recent *State Farm* decision, this Court confirmed that due process review of a punitive award must focus on the factually-specific issues of reprehensibility, ratios, and comparable penalties. *State Farm*, 538 U.S. at 418. Amana's proposed rule would shift the focus instead to the formalistic issue of whether a reviewing court made express findings regarding all punitive damages factors, some of which may have no possible relevance to the particular case. This Court has already rejected such a formalistic approach to due process review, by holding that it was "certainly not prepared" to deem a punitive award unconstitutional simply because the trial judge did not "articulate his reasons" for the award. *TXO*, 509 U.S. at 464-5.

Moreover, for reasons that Amana does not explain, its first proposed rule would apply only if the punitive award were at least $100,000. The due process clause, which is aimed at preventing arbitrary government action, should not be enforced through such an arbitrary rule. *See State Farm*, 538 U.S. at 416 ("The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor"); *Demore v. Kim*, 538 U.S. 510, 532 (2003) (Kennedy, J., concurring) (explaining that the Due Process Clause "prohibits arbitrary deprivations of liberty").

C. Under Amana's second proposed rule, the constitutionality of a punitive award would improperly depend on the highest amount of punitive damages affirmed by a state court in another case.

Under Amana's second proposed rule, "the highest previous punitive damage award affirmed by the highest court of a state" would set "the presumptive ceiling for any federal award under that state's law." Pet. 14.

As an initial matter, Amana's rule falsely assumes that the highest punitive award affirmed to date constitutes a determination of the maximum permissible punitive award. In fact, the highest award affirmed by a state court is a function of the punitive awards it has been asked to review. If, for instance, a court is asked by a defendant to review a jury's punitive award of $1 million, the court cannot increase that award even if it determines that a greater award would be constitutional.

In addition, implementing Amana's second rule would violate this Court's mandate that a punitive award "*must* be based upon the facts and circumstances of *the defendant's* conduct and the harm to *the plaintiff*." *State Farm*, 538 U.S. at 425 (emphasis added). This Court has already rejected the notion that punitive damages in one case should be used as a "test" for punitive damages in another case:

> It is a relatively straightforward task to draw intra-jurisdictional and interjurisdictional comparisons on such matters as the definition of first-degree murder (*Schad*) or the penalty imposed on nonviolent repeat offenders (*Solem*). The same cannot be said of the

> task of drawing such comparisons with regard to punitive damages awards by juries. Such awards are the product of numerous, and sometimes intangible, factors; a jury imposing a punitive damages award must make a qualitative assessment based on a host of facts and circumstances unique to the particular case before it. *Because no two cases are truly identical, meaningful comparisons of such awards are difficult to make.* . . . Thus, while we do not rule out the possibility that the fact that an award is significantly larger than those in apparently similar circumstances might, in a given case, be one of many relevant considerations, *we are not prepared to enshrine petitioner's comparative approach in a "test" for assessing the constitutionality of punitive damages awards.*

TXO, 509 U.S. at 457-8 (citations omitted) (emphasis added).

The application of Amana's second rule would, in certain circumstances, also violate the Supremacy Clause of the Federal Constitution. A state court may be asked to review a punitive award based not on federal constitutional law but rather solely on *state* constitutional law. *See generally Arizona v. Evans*, 514 U.S. 1, 8 (1995) ("[S]tate courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution"); *Racing Ass'n of Central Iowa v. Fitzgerald*, 675 N.W.2d 1 (Iowa 2004) (holding that Iowa's disparate tax rates for racetracks and riverboats violate the Iowa constitution notwithstanding this Court's determination that the rates satisfied the Federal Constitution). Under Amana's proposed rule, the punitive award based entirely on state law would improperly dictate

federal constitutional law. *Contra* U.S. Const., Art. VI, cl. 2 (providing that the Constitution "and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . .").

II. The Eighth Circuit's factbound determination of a punitive award is entirely consistent with this Court's punitive damage jurisprudence and does not warrant the granting of certiorari.

As its second argument, Amana alleges that the Eighth Circuit erred in applying the three *Gore* guideposts. Even if the Eighth Circuit had erred, the granting of certiorari would not be warranted. *See* Sup. Ct. R. 10 ("A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"). However, the Eighth Circuit did not err. The Eighth Circuit's decision is entirely consistent with this Court's punitive damages jurisprudence.

The Eighth Circuit's decision focuses, appropriately, on what this Court has identified as the most important guidepost. *See State Farm*, 538 U.S. at 419. The decision articulates the specific reprehensibility factors identified in *State Farm* and contains an in-depth analysis of Amana's fraudulent scheme. Pet. App. 3-8. Contrary to Amana's suggestion, the Eighth Circuit judges did not shun their constitutional roles and assume the roles of "super-jurors" by engaging in this analysis. Pet. 15, 18. Rather, the judges were following this Court's mandate to analyze reprehensibility based on the particular facts of the case. *See State Farm*, 538 U.S. at 425. Based on their review of the evidence, the Eighth Circuit judges unanimously determined that Amana had engaged in "an extraordinarily

reprehensible scheme to defraud." Pet. App. 8. In so holding, the Eighth Circuit adopted Trial Judge Eisele's conclusion that he could "hardly think of a more egregious intentional and malicious business fraud case." Pet. App. 6, 34.

The Eighth Circuit also considered the second guidepost, the ratio between punitive damages and compensatory damages. Pet. App. 7-8. The ratio imposed by the Eighth Circuit against Amana is less than 5 to 1. That ratio is, therefore, entirely consistent with *State Farm*, which explains that "*single-digit multipliers* are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1 or, in this case, of 145 to 1." *State Farm*, 538 U.S. at 425 (citations omitted) (emphasis added).

The Eighth Circuit's decision also mentions the third *Gore* guidepost. Pet. App. 5-6. As the trial court discussed in its decision, a criminal defendant who commits fraud in Iowa faces not only a substantial fine but also ten years of imprisonment. Iowa Code §§ 714.8, 714.9, 902.9.[13] Iowa's serious criminal penalties for fraud reflect a strong public policy that supports a substantial punitive award. *See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 (1991) (in affirming punitive damages that were four times the compensatory damages and more than 200 times the plaintiff's out-of-pocket expenses, noting that imprisonment was a possible criminal penalty for fraud).

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13. While Amana suggests to this Court that the criminal statutes cited in the trial court's decision do not have "anything to do with this case" (Pet. 7 n.5), Amana cited those same provisions to the trial court in its post-trial motion.

In support of its argument that the Eighth Circuit erred in imposing punitive damages against it, Amana points to the punitive awards in three *subsequent* Eighth Circuit decisions. Pet. 18-20. Amana made this precise argument to the Eighth Circuit in support of its Petition for Rehearing En Banc, which the court denied. If there truly were a conflict among Eighth Circuit decisions, the appropriate mechanism for resolution of the conflict would have been en banc consideration by the Eighth Circuit, not the granting of certiorari by this Court. Fed. R. App. P. 35(a). *Cf.* Sup. Ct. R. 10. Moreover, the differing punitive awards do not reflect an intercircuit conflict. Instead, they indicate that the Eighth Circuit is consistently following this Court's mandate to base every punitive award on the particular "facts and circumstances" of the case. *See State Farm*, 538 U.S. at 425. The subsequent cases cited by Amana, which involve wrongful death, race discrimination, and unfair competition, are factually distinguishable from Amana's fraud against Eden. The cases also involve varying degrees of reprehensibility, which this Court has identified as the most significant factor in a punitive damages analysis. *State Farm*, 538 U.S. at 419. For instance, while Amana was found to have engaged in an "extraordinarily reprehensible scheme to defraud" (Pet. App. 8), the defendant in *Conseco* was deemed to have engaged in behavior that was not "extremely reprehensible." *Conseco Fin. Servicing Corp. v. North Am. Mortgage Co.*, 381 F.3d 811, 825-6 (8th Cir. 2004) (imposing $7 million punitive award).

III. The various "approaches" to punitive damages described by Amana would not constitute a basis for certiorari even if they accurately characterized circuit court decisions since *State Farm v. Campbell*, which they do not.

Amana does not and cannot argue that an intercircuit conflict has developed in the two years since this Court's 2003 *State Farm* decision. Instead, as its third argument, Amana attempts to categorize circuit court decisions since *State Farm* in terms of various "approaches" to punitive damages. Pet. 21. Even if they accurately characterized the decisions, the "approaches" identified by Amana would not constitute a basis for certiorari. *See* Sup. Ct. R. 10. *But cf. KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 125 S. Ct. 542, 547 (2004) (granting certiorari to resolve intercircuit conflict regarding whether the likelihood of confusion bars a fair use defense to a trademark infringement claim).

What is more, the "approaches" identified by Amana mischaracterize the analysis of the circuit courts. While Amana suggests that Fifth Circuit is concerned only with applicable civil penalties (Pet. 23), the Fifth Circuit case cited by Amana expressly acknowledges a court's obligation to apply all three *Gore* guideposts. *Lincoln v. Case*, 340 F.3d 283, 294 (5th Cir. 2003). Amana implies that the Ninth Circuit will permit any punitive award "so long as the punitive-to-compensatory damage ratio is less than ten-to-one" (Pet. 24). In fact, the Ninth Circuit expressly acknowledges this Court's continued refusal to adopt a bright-line ratio. *Hangarter v. Provident Life and Accident Ins. Co.*, 373 F.3d 998, 1015 (9th Cir. 2004). Amana unfairly criticizes the Federal Court's analysis as a "superficial and simplistic approach" (Pet. 25)

notwithstanding the fact that the Federal Circuit decision cited by Amana is based on an application of three *Gore* guideposts. *Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 345 F.3d 1366, 1369-72 (Fed. Cir. 2003).

As Amana's own authority demonstrates, the circuit courts are following this Court's punitive damages jurisprudence when determining the constitutionality of punitive awards. The guidance that Amana contends is necessary has already been provided by this Court, as recently as its 2003 *State Farm* decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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